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The Criminal Law Revolution and Its Aftermath: 1969-1971 by Editors of The Criminal Law Reporter

William Gangi
St. John's University

Book Reviews

THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1969-1971. By the Editors of *The Criminal Law Reporter*. Washington: The Bureau of National Affairs, Inc., 1972. Pp. 335. $10.00.

The Editors have provided the scholarly community and practictioners of the law with an excellent reference work. Indeed, even the jacket describes accurately the book's contents. "This book provides a Term-by-Term, case-by-case review of the Supreme Court in the area of criminal law since *Mapp v. Ohio*." For those who have racked their brains looking for a stray citation, a forgotten date, the correct chronology of cases, or which Justice said that catchy little phrase or made that abominable admission, this book will more than pay for its purchase price by saving many trips to the library or piles of those photostats stashed away somewhere in a file drawer, attic or basement.

The title is somewhat modest, for the book scans an enormous range material. There are cases decided by the Court, literally from "Abortion" to "Witnesses," including such staples as the major decisions on the First Amendment, guilty pleas, interrogation and confessions, military and selective service, confrontation, right to counsel, search and seizure and self-incrimination. Not only do the editors proceed from year to year and provide the standard table of cases, but an additional excellent reference aid, a table cases arranged by subject classification, also is included.

Two minor organizational criticisms may be noted. First; the table of cases and cases arranged by subject classification frequently do not include cases mentioned in the course of the volume which were not decided during the 1960-1971 terms of Court. Thus, one must scan the book to find which case decided between 1960-1971 overruled prior cases. For example, while the editors note during their discussion of *Mapp* that *Wolf* was overruled, *Wolf* is not listed in either index. Second, for some reason the cases do not proceed as they were decided. While it is understandable and convenient that the editors divided the cases by subject matter for each term of Court, there seems to be no reason why the cases should not follow in perfect chronological order. Why, for example, should *Escobedo* precede *Massiah*? Although the editors' presentation may make more sense to them and their readers alike, such methodology serves to distort the actual historical

picture and brings a certain logical development to the cases which in fact may be absent.

The editors fulfill another promise, one which I was particularly pessimistic about: "Each case is concisely analyzed and attention is drawn to earlier cases now overruled or distinguished and to the views of dissenting Justices."[1] The editors have no ideological axe to grind. Each analysis is done fairly and concisely—no easy task considering the topics covered. I could not detect any bias whatsoever, only the constant attempt to understand the views of the Justices and the general trend of the Court's decisions. The crucial points in majority and often minority opinions are presented, with the editors always alert to clarify differences between the views of the Justices. They also have a discerning eye for telling arguments, regardless of whether they stem from majority or minority points of view. The introduction, clear and arranged topically, is helpful, providing the reader with a quick summary of current law. The editors' interjections throughout the volume are objective, concise and meaningful.

The book is not, nor does it pretend to be, a substitute for reading either the actual opinions of the Court or the legal literature. Thus, the publisher's claim that the work will prove "extremely useful to . . . law enforcement officers" is doubtful.[2] First, the case law is too confusing, even to the Justices, in such areas as confessions and searches and seizures, and second, the stakes are too high—exclusion of pertinent evidence, that there appears to be no prudent substitute for reading the actual opinions or accepting the guidelines issued by official prosecution sources.

The diversity of subject matter, the multiplicity of opinions, the shifting of majorities, the exceptions and modifications, make it a book with which one would not curl up by the fire. The book is, therefore, primarily a reference work. It is a reference work, however, which one engaged in Bill of Rights research can justify purchasing for his personal library, and, without question, it would be a valued addition to law and university libraries. Moreover, this contribution to the researcher and student of the Court could be solidified by moderately priced annuals or biannual updatings, perhaps also including pertinent bibliographical material.

So concentrated a reading of Court decisions between 1960 and 1971 cannot but help invoke comments of a wider perspective. The controversey revealed in *The Criminal Law Revolution and Its After-*

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[1] BUR. OF NAT'L AFFAIRS, THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1971 inside book jacket (1972) [hereinafter cited as CLR].

[2] *Id.*

math does not center upon whether the Justices have rewritten the constitutional protections afforded by the First, Fourth, Fifth, Sixth and Fourteenth Amendments, for all parties to the controversy accept that proposition as true. The debate, and it is a continuing one, is over whether the Court has enhanced or diminished the Constitution in the process. While in many respects this book is a dream come true, an opportunity to expand upon an infinite number of topics close to the reviewer's heart, time and the editor's poised red pencil necessitate only brief indulgence.

One prominent thread runs throughout this volume and appears to hold the fabric of the Warren Court's criminal law revolution together, its almost religious subscription to the exclusionary rule. The Court has defended its utilization primarily on two grounds: 1) as a means by which an individual's Fourth, Fifth and Sixth Amendment rights may be effectively safeguarded against police misconduct, and 2) as ethically necessary if courts are not to sanction police illegality. As this volume reveals, there was an increasing tendency for the Warren Court to expand the application of the exclusionary rule by defining new "illegalities" and coupling them with the poisonous tree doctrine. The branches and roots of this "tree" have made it, in recent years, not merely another shrub requiring care in the constitutional garden, but a tree which in its quest for self-preservation (read effectiveness) and nourishment has proved deadly to old familiar, and in many ways still logically sound, *Wolf, Snyder, Palko* and *Twining* plantings.[3] This tree has not only proved poisonous to the chain of physical or verbal evidence, but to criminal jurisprudence itself. The exclusionary rationale is often a substitute for thinking and the agonizing choices associated with political order and public policy. The Court has claimed that utilization of the exclusionary rule preserves its sense of ethics by not sanctioning police illegality; yet, rarely have we seen the Justices admit ethical responsibility when justice is not done, when the guilty go free.

The editors trace the haunting consistency of the Warren Court in their attempt to make the exclusionary rule work, but the idiosyncrasies of individual Justices from time to time restrains this attempt. Sacrificed at the altar of exclusion has been an essential ingredient of justice, evidence "relevant, reliable and highly probative

[3] *Compare* Wolf v. Colorado, 338 U.S. 25 (1949); Snyder v. Massachusetts, 291 U.S. 97 (1934); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908) *with* Mapp v. Ohio, 367 U.S. 643 (1961); Malloy v. Hogan, 378 U.S. 1 (1964); Duncan v. Louisiana, 391 U.S. 145 (1968) and Benton v. Maryland, 395 U.S. 784 (1969).

of the issue."[4] Justice, under the Warren Court, has been subjected to new onslaughts of the "sporting theory,"[5] not even redeemed by any concrete contribution in actually punishing the malicious and/or corrupt police officers whom the exclusionary rule cannot touch.[6] Innocent victims of police misconduct (that is, where no evidence is found) are offered not one whit of additional protection by the exclusionary rule. Only where the illegality is fruitful does the rule come into play. Only the guilty, therefore, obtain a privilege unavailable to the innocent victim of police misconduct—exclusion of pertinent evidence. In fact, the Warrent Court has made pursuit of those who violate public trust more difficult.[7]

While space does not permit examination of the Court's ideological posture,[8] a review of the cases presented in this volume reveals certain inconsistencies on the part of the Justices. We see Justice Brennan assert that "the government's primary responsibility in a criminal case was to see that justice was done, rather than merely to win the case;"[9] or, the Court quite rightly condemning a prosecutor's deliberate misrepresentation of the truth as denying a fair trial;[10] or, for example, the remarks of Justice Fortas concurring in *Giles v. Maryland*:

> A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. . . . If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the State caused to be given at the trial—the State is obliged to bring it to the attention of the court and the defense.[11]

The evident concern of the Court with the discovery of truth, hence justice, appears more like an exercise in nostalgia than concern

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[4] CLR, *supra* note 1, at 39. Massiah v. United States, 377 U.S. 201 (1964) (White dissenting). *See also* Linkletter v. Walker, 381 U.S. 618 (1965) and Kaufman v. United States, 394 U.S. 217 (1969).

[5] *See* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUD. SOC'Y 178 (1937).

[6] CLR, *supra* note 1, at 143; Brooks v. Florida, 389 U.S. 413 (1967).

[7] CLR, *supra* note 1, at 106; Garrity v. New Jersey, 385 U.S. (1967); Gardner v. Broderick, 392 U.S. 273 (1968).

[8] *See, e.g.*, Packer, *Two Models of the Criminal Process*, 113 U. PENN. L. REV. 1 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Griffiths, *Ideology in Criminal Procedure or, A Third 'Model' of the Criminal Process*, 79 YALE L.J. 359 (1970).

[9] CLR, *supra* note 1, at 5, paraphrasing J. Brennan in Campbell v. United States, 365 U.S. 85 (1961).

[10] *Id.* at 108; Miller v. Pate, 386 U.S. 1 (1967).

[11] *Id.* at 110; Giles v. Maryland, 386 U.S. (1967).

rooted in principles subscribed to by the Warren Court. The Court, on the contrary, had insisted that "there are considerations which transcend the question of guilt or innocence,"[12] and the Chief Justice had put the requirements of this code brutally in *Miranda:* "the existence of independent corroborating evidence, produced at trial is, of course, irrelevant. . . ."[13] Pursuit of truth and the exclusionary rule, like oil and vinegar, do not mix, a lesson as old as *Lisenba* and made abundantly clear in *Miranda.*[14] The Court has made its contribution to making the criminal process a game, and now it expresses horror when participants play that game spiritedly. Prosecutors are chastised to seek "justice," while defense attorneys are given free reign to protect their clients' "interests."

Changes in the Court's personnel make attempted pruning of the poisonous tree and denial of its exclusionary nourishment a realistic possibility.[15] As noted by Chief Justice Burger, we pay a "monstrous price . . . for the exclusionary rule in which we seem to have imprisoned ourselves."[16] The issue the Court may confront in coming years is how we can modify—abolition seems impractical—the exclusionary rule while reasonably protecting violations of individual liberty and establishing laws conducive to actual punishment of illegal enforcement of the law.[17]

William Gangi[*]

DEFENDING BUSINESS AND WHITE COLLAR CRIMES. By F. Lee Bailey & Henry B. Rothblatt, New York, New York: Lawyers Co-Operative Publishing Co., 1969. Pp. 740.

What two famous criminal trial lawyers have a habit of striking fear in the hearts of prosecutors? Why, F. Lee Bailey and Henry B. Rothblatt, of course. They do it in the courtroom and they do it when they team up to write a book for the benefit of their fellow trial lawyers. Their book, *Defending Business and White Collar Crimes,* has brought insight and confidence to the defense bar.

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[12] Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960).
[13] Miranda v. Arizona, 384 U.S. 436, 481 n.52 (1966).
[14] Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Rogers v. Richmond, 365 U.S. 534 (1961); Lisenba v. California, 314 U.S. 219 (1941).
[15] CLR, *supra* note 1, at 277; Harris v. New York, 401 U.S. 222 (1971).
[16] *Id.* at 267; Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971).
[17] *Id.* at 275; Biven v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Chief Justice Burger dissenting).
[*] Assistant Professor of Political Science, St. John's University. Ph.D., University of Notre Dame.